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GENERAL COUNSEL'S OPINION NUMBER 56-4, DATED 22 MAY 1956

A release purporting to save the Government from liability for the results of the negligence of its agents is ineffective against an employee's right to compensation under the Federal Employee's Compensation Act.

The effectiveness of such a release as a defense against an action brought under the Federal Tort Claims Act is questionable.

TO THE DIRECTOR OF TRAINING

1. You have consulted us on the legal implications in having persons who fly between here and X-------- on the Y------- plane for their own convenience execute a release which would save the Government from any liability to the survivors of such persons in the event of their death or injury.

2. Claims against the United States for personal injury or death as a result of an accident involving the Y------- plane will be cognizable under the provisions of the Federal Employees' Compensation Act in the case of employees injured while in the performance of their duty. Those not in the performance of duty may bring action against the United States under the provisions of the Federal Tort Claims Act. The remedies are exclusive and the employees right of action is not his to choose, but is determined on the basis of his duty status. The employees whom you wish to have execute a release will not be in the performance of duty while travelling and therefore any claims for their injury or death will be pursued under the provisions of the Federal Tort Claims Act. The validity of the release in such cases is questionable. The release should not be used where the employee is travelling in a duty status. Such an employee is entitled to the remedies provided in the Federal Employees' Compensation Act and an agreement to waive those remedies will not be effective. The Regulations provide:

"S 1.23 Waiver not authorized. No official superior is authorized to require an employee to enter into any agreement, either before or after an injury, to waive his right to claim compensation."

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The discussion below, therefore, is concerned only with the validity of the release in case of an action against the United States under the provisions of the Federal Tort Claims Act.

3. The use of such a release is common in the military service when persons are carried for their own convenience rather than on official business. We discussed the problem with Colonel M. and Major F. of the Military Affairs Section, Air Force JAG. They both have serious doubt as to the validity of the release. MATS uses the release not only for passengers travelling for their own convenience but for employees of other Government agencies and contractors who may be travelling on official business. To date the validity of the release has not been tested in Court. It was raised in one case (Chapman et ux v. United States, 194 F. 2d 974) but the Court decided the case on other grounds and declined to rule on the validity of the release. Colonel M. and Major F. feel that the release would not be upheld if contested in Court simply on the ground that it is an attempted contract against liability for future negligence and as such would be held to be against public policy. They feel that its greatest value may be that it will discourage actions against the Government in many cases and perhaps encourage some passengers to take out flight life insurance, thereby reducing the chance that a survivor would attempt to sue the Government.

4. As stated above, the Courts have yet to rule upon the question with which we are directly concerned. There are, however, cases and textbook law on similar situations. These are generally concerned with common carriers, most often railroads. Williston on Contracts, Revised Edition, Volume 4, Section 1109 states: "A carrier may not stipulate for freedom from liability for negligence." This section of the treatise is, of course, concerned with common carriers and, therefore, the situation is not quite the same as in the case of a Government-owned aircraft not carrying passengers for hire. Williston's reasoning in this section would seem to favor the releases concerned here at least insofar as passengers carried for their own convenience are concerned. He states at page 3103: "A distinction is taken between services for which the carrier receives compensation, and services rendered gratuitously. As to the latter, the carrier may, in the majority of jurisdictions, contract for freedom from liability for negligence. Therefore, a gratuitous pass providing that a passenger riding thereon exempts from liability the carrier for injuries caused by the negligence of the carrier is enforced, unless the carrier was guilty of gross negligence or wilful misconduct. It is important to observe, however,

that transportation is not necessarily gratuitous because no payment is directly made for it. Thus, where an employee is given a pass as part of his compensation . . ., the passenger is carried for compensation, and the carrier cannot exempt itself from liability where the consequence is of its own negligence."

5. Restatement of Contracts, Section 575, states the law in this field as follows: "(1) A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation."

6. Given the situation as stated by the Office of Training, that is where the aircraft is not a common carrier and where the employee is carried only for his convenience, there would seem to be at least a chance of the validity of the release in question being upheld in an action for damages against the United States. A further protection of a practical nature may be the hesitancy of the courts to find negligence on the part of the pilot of an aircraft. More often than not the proximate cause of an aircraft accident cannot be determined, at least not to a degree sufficient to satisfy a court trying a negligence case. In addition, as in the Chapman case cited above, the court may be unwilling to rule that any particular action of a pilot in a moment of emergency was negligent. The court is more inclined to say that in the split second and under the emergency conditions in which a pilot had to make a life or death decision no action by him in attempting to avoid the accident can be said by a court with the benefit of leisurely aftersight to be negligent. In addition to the emergency situation the pilot's own life is at stake and it usually will be assumed that he took the action which seemed at the moment most reasonable under the circumstances.

7. In summary: The release would be invalid in the case of an employee injured or killed in performance of duty and entitled to compensation under the Federal Employees' Compensation Act. Employees flying on business should not be requested to sign it. Its validity

in the case of an employee flying for his own convenience cannot be ascertained in the absence of case precedent. However, it might be useful as evidence of the employee's non-duty status and in addition to its cautionary and deterrent value, there is reason to believe that its validity might be upheld in a test by litigation. Under the circumstances this Office will interpose no legal objection to a policy decision to use such a release when the employee is flying for his own convenience.

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